BOARD OF INQUIRY (*Human Rights Code*)

IN THE MATTER OF the Ontario *Human Rights Code*, R.S.O. 1990, c.H.19, as amended;

AND IN THE MATTER OF the complaint by Tuomo Ketola dated October 10, 2002, alleging a violation of the right to contract on equal terms without discrimination because of disability, and amended by Order of the Board dated November 8, 2001, alleging reprisal.

B E T W E E N :

Ontario Human Rights Commission

- and -

Tuomo Ketola

Complainant

- and -

Value Propane Inc., Robert Mungall and Renee Mungall-Brethour

Respondents

DECISION ON REMEDY

Adjudicator	:	Matthew D. Garfield
Date	:	August 7, 2002
Board File No:		BI-0424-01
Decision No	:	02-014-R

Board of Inquiry (*Human Rights Code*)
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APPEARANCES

Ontario Human Rights Commission	)	Prabhu Rajan, Counsel
Tuomo Ketola, Complainant	)	Tuomo Ketola and Irja Ketola
Value Propane Inc., Robert Mungall and Renee Mungall-Brethour, Respondents	)	Charles Mark, Q.C., Counsel [to March 11, 2002] Renee Mungall-Brethour [on March 25, 2002]

INTRODUCTION

On July 16, 2002, the Board issued its Reasons for Decision on liability in this matter. The Board found that the Respondents violated Tuomo ("Tom") Ketola's right to contract on equal terms without discrimination because of disability (section 3) and engaged in reprisal against him (section 8). The Board gave the parties three weeks to resolve the issue of remedy (including the Small Claims Court claim and counterclaim if the parties wished) with the assistance of a Board mediator. The three weeks has passed and no mediation has occurred. The Board now gives its decision on remedy.

STATUTORY PROVISION

Subsection 41(1) of the *Human Rights Code*, R.S.O. 1990, c. H.19, as amended ("*Code*") gives the Board wide powers with respect to remedy. That subsection reads:

> 41. (1) Where the board of inquiry, after a hearing, finds that a right of the complainant under Part I has been infringed and that the infringement is a contravention of section 9 by a party to the proceeding, the board may, by order,
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> (a) direct the party to do anything that, in the opinion of the board, the party ought to do to achieve compliance with this Act, both in respect of the complaint and in respect of future practices; and
>
> (b) direct the party to make restitution, including monetary compensation, for loss arising out of the infringement, and, where the infringement has been engaged in wilfully or recklessly, monetary compensation may include an award, not exceeding $10,000, for mental anguish.

One purpose of compensation under the *Code* is to restore a complainant to the position s/he would have been in had the discriminatory act(s) not occurred. The goal is not to punish the respondent. Regarding the restitutive award, the Board is not limited by the dollar amount for loss arising out of the infringement of the right, often referred to as "general damages", nor for special damages. The only limitation is for damages for mental anguish ($10,000.00): *Ontario (Human Rights Commission) v. Shelter Corp.*, [2001] O.J. No. 297, at para. 43. The Board is not empowered to make an award of punitive or exemplary damages. The Board may order public interest remedies: e.g., training, creation of an anti-discrimination or harassment policy.

DAMAGES FOR THE DISCRIMINATORY ACTS

Loss Arising Out of the Infringement Including Mental Anguish

In making such an award, the Board considers the following factors: the humiliation; the hurt feelings; the loss of dignity and self-respect of the Complainant; the vulnerability of the Complainant; and the seriousness, frequency and duration of the offensive treatment. The emotional stress suffered by the Complainant is only properly considered when making an award for the mental anguish component of the damages.

In the instant case, the Board also considers the following in its quantification of damages for loss arising out of the infringement of the right: the seriousness of the charge of theft and the stigma attached thereto – the attack on Mr. Ketola's basic character; the impact in terms of gossip in a small town environment where the Complainant and his family live; the manner in which he was dismissed; the timing of the termination - Mr. Ketola was suffering from a debilitating fatal disease; the financial implications - Mr. Ketola was the only "breadwinner" for the family and his contract with Value was his sole source of income. Furthermore, the discriminatory acts had several components and were over a period of time: i.e., the removal of the telephone on two occasions; the reduction of work days; the hiring of others to do some of his tasks; the termination on January 18, 2000; and the failure to investigate further or reconsider thereafter.

Mr. Ketola's evidence is as follows:

> I felt mortified that I could not care for my family and that I was thought of as a thief. I felt guilty that I had to put my family, especially my wife, through such pain and hardship. I was feeling all these emotions while trying to come to grips with being diagnosed with a fatal illness and maybe only a few more years to live.
> ...
> The respondent's termination of my employment and the false and contrived reasons they gave (that I was a thief) made me feel humiliated. It was a source of embarrassment in my community, which is a small town of approximately 3000 people. I don't want to go out in the community anymore. My wife had told me how people in the town are commenting on not only my disability but also how the respondents fired me and accused me of being a thief and my subsequent legal struggles.

> Also, as I said earlier, my condition gets worse with stress. As of the day of my dismissal, my symptoms have increased dramatically. My health has plummeted. My speech was getting almost impossible to the point that in January 2001, I had to order a voice synthesizer…
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> My condition is getting steadily worse and the continued stress of the respondents' past and present discriminatory behaviour towards me is no doubt contributing to my declining health…I want to clear my name and be redressed for the respondents' discriminatory treatment of me but I don't know how much longer I have left.

The Board accepts the above evidence. It was corroborated by his wife. The Board also heard and accepts the evidence about the negative financial impact on the Complainant and his family.

The Board is satisfied, without having heard medical expert evidence, that the actions of the Respondents exacerbated the stress and anxiety that Mr. Ketola experienced. Obviously, the Respondents are not responsible for Mr. Ketola having acquired ALS and the degenerative, fatal aspect of this disease. However, their actions worsened his emotional and physical state.

"Mental Anguish"

This head of damages is only triggered where the violation was engaged in wilfully or recklessly by a respondent and resulted in mental anguish to a complainant. While aggravating in nature, they are not meant to be punitive. This type of award takes into account intangible injuries.

The Divisional Court has defined "wilfully" to require both that the conduct be intentional and the infringement of the complainant's rights be itself the purpose of the conduct: *York Condominium Corporation No. 216 v. Dudnik* (1991), 3 O.R. (3d) 360, at 376. Professor Cumming, then sitting as an *ad hoc* Board, defined "recklessly" as conduct, which is "such as to evince disregard of or indifference to its consequences, that is, the conduct is done with rashness or heedlessness; it is done wantonly", without regard for the possible injurious impact on the complainant: *Cameron v. Nel-Gor Castle Nursing Home* (1984), 5 C.H.R.R. D/2170, at D/2198.

The Board adopts the analysis of Vice-Chair DeGuire of what constitutes "mental anguish" in *Fuller v. Daoud*, [2001] O.H.R.B.I.D. No. 19, at para. 66:

> Mental [A]nguish suggests a relatively high degree of mental pain and distress. It is more than mere disappointment, angry feelings, worries, resentment or embarrassment. Yet, it necessarily includes all of the foregoing. It does, however, include mental sensation of pain resulting from painful emotions such as grief, severe disappoint[ment], indignation, wounded pride, shame, despair or public humiliation: (see Black's Law Dictionary, 6th ed.). Mental anguish is a subjective suffering that does not require medical proof.

The Board considers the following factors in its award for mental anguish: the impact, past and ongoing, of the acts on the Complainant's emotional state; the vulnerability of the Complainant; and the frequency and intensity of the conduct. There is no requirement that medical evidence be given to substantiate this claim, although it may be useful to the Board.

The Board is satisfied that the Respondents' actions in violating Mr. Ketola's section 3 right were reckless. The recklessness culminated in their not even providing a long time, trusted independent contractor, who helped set up their business, a chance to explain himself, even after evidence was brought to their attention of the possibility of his innocence.

The Commission and Complainant request damages of $30,000.00 for the loss arising out of the infringement of Mr. Ketola's section 3 right, including mental anguish. In all the circumstances, the Board considers an appropriate amount to be $20,000.00, which includes the maximum amount of $10,000.00 for mental anguish.

Special Damages

The Commission and Complainant request the following special damages:

- Loss arising out of the reduction in the Complainant's work week from five to four days;
- Outstanding balance owed to the Complainant for the month of January, 2000, plus interest;
- Costs to keep T.K. Sales' business account open due to non-payment of the January 2000 account to November 2001, inclusive; and

- Two months of work following the termination of January 2000. The Respondents' counsel Mr. Mark had stipulated in the hearing that his clients would not challenge Mr. Ketola's claim that he could have worked for only two further months after the termination of his contract.

The Board considers the above special damages reasonable and awards the following:

Reduction in work week (Fridays) from July 1998 to January 18, 2000 (79 x $100.00)	$ 7,900.00
Outstanding January 2000 balance (without interest):	400.00
T.K. Sales' bank account cost - January 2000-November 2001	115.00
Two month's work per the contract	4,000.00
Total:	$12,415.00

DAMAGES FOR THE REPRISAL

Loss Arising Out of the Infringement Including Mental Anguish

Commission counsel submits:

> [t]his is one of the worst cases of reprisal I have heard or read about. The respondents openly and unabashedly admit to wanting to punish Mr. Ketola for his human rights complaint. To make matters worse, the respondents fully intend on continuing to retaliate against Mr. Ketola whether he is dead or alive.
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> ...
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> It is the Commission's submission that the Board must send a clear message to the respondents and potential respondents that it is wrong to punish someone simply because he/she files a human rights complaint – if you do so, there will be serious consequences. A significant and monumental order, both in terms of the actual decision and a monetary award, is not only important in terms of Mr. Ketola's personal interest but it is also of the utmost public interest.

The Board believes this is a serious case of reprisal, and the damages ought to reflect this. However, the goal of the *Code* is not to punish respondents. Accordingly, the damages awarded are compensatory in nature, including those for aggravation of injury, but they do not contain any punitive element.

The reprisal found included several actions: the threat of criminal prosecution; the contacting of the police; the Small Claims Court action; and the aggravating statements like the Respondents will continue to pursue the civil claim, including as against Mr. Ketola's estate.

The Board finds that there was an intention and wilfulness on the part of the Respondents to punish and intimidate Mr. Ketola for bringing his human rights complaint. The Board awards the amount of $20,000.00 for loss arising out of the infringement of Mr. Ketola's section 8 right, which includes the maximum amount of $10,000.00 for mental anguish.

LEGAL COSTS

Statutory Provision

Subsection 41(4) of the *Code* governs the Board's limited power to award costs. It reads:

> Where, upon dismissing a complaint, the board of inquiry finds that,
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> (a) the complaint was trivial, frivolous, vexatious or made in bad faith; or
> (b) in the particular circumstances undue hardship was caused to the person complained against,
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> the board of inquiry may order the Commission to pay to the person complained against such costs as are fixed by the board.

Costs under subsection 41(4) have rarely been granted.

There is also a costs provision in the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, as amended ("*SPPA*"). Section 17.1 provides that a tribunal may set out in a rule a mechanism for ordering costs in a proceeding. It shall not be invoked unless "the conduct or course of conduct of a party has been unreasonable, frivolous or vexatious or a party has acted in bad faith." The Board has not passed such a rule. Consequently, costs are governed by subsection 41(4) only.

Request for Costs Here

The Commission and Complainant seek an order for the Complainant's actual legal costs and "expected" future legal costs incurred as a direct result of the Respondents' reprisal action. Not surprisingly, the Respondents oppose such an order. These costs are for the separate legal representation Mr. Ketola received for the human rights complaint (up to and including the Initial Conference Call with the Board) and the already incurred and future legal expenses in the Small Claims Court matter.

Commission counsel argues that the Complainant's legal costs are a loss arising out of the infringement of his right to be free from reprisal. He refers to Mr. Ketola's evidence:

> I had fully intended to simply pursue my human rights complaint on my own, as I was told that I did not necessarily require legal representation. However, the threats made by the respondents made me feel as though I had no choice but to get a lawyer. I felt that I absolutely needed legal counsel if I wanted to continue to pursue my human rights complaint…

Ten days after referral of the subject-matter of the Complaint to the Board, the Respondents served Mr. Ketola's lawyer with a Statement of Claim in Small Claims Court, which the Board has found constituted reprisal. Mr. Ketola felt he had "no choice but to have my human rights lawyer respond."

Commission counsel submits that his request for "costs" is really a request for legal expenses compensable as a "make-whole" restitutive award under paragraph 41(1)(b) of the *Code*. He distinguishes this request from the Divisional Court's decision on costs under subsection 41(4) in *Ontario (Liquor Control Board) v. Ontario (Ontario Human Rights Commission)*, [1988] O.J. No. 167 and the Board's decision in *Curling v. Torimiro*, [2000] O.H.R.B.I.D. No. 16. In the instant case, the request is for *pre-referral* legal expenses, whereas in *Curling* the order was granted for costs incurred *during the hearing* before the Board. At the pre-referral stage, Commission counsel had not been assigned and so the Complainant could not rely on the advocacy of the Commission. Commission counsel says Mr. Ketola only retained counsel (David Cass) after getting a "pit bull" response from the Respondents.

The Board has several comments to make on the above request. First, whether a complainant receives a "pit bull" response or a "chihuahua" response is not relevant to the determination of whether costs or "legal expenses" should be awarded. Subsection 41(4) governs the award of costs. That subsection is not triggered here as the Complaint was not dismissed and the request for costs is as against the Respondents, not the Commission. The Board adopts the reasoning of Rosenberg J. writing for the Divisional Court in *Ontario (Liquor Control Board)* at 12-13:

> The legislature has expressly provided for the recovery of costs in limited circumstances "to the person complained against" under s. 40(6) [now s. 41(4)] of the Ontario Human Rights Code, 1981, S.O. 1981, c. 53. The power of the Board of Inquiry under s. 40(1) to "make restitution including monetary compensation" [now s. 41(1)] is not an express provision for the award of costs to complainants under the Code. The rule of liberal interpretation to carry out the objects of the Code to, as far as possible, remedy the effects of and prevent discrimination do not apply to procedural matters or the question of costs.
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> ...
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> Under the principle of statutory interpretation, *expressio unius exclusio alterius*, by expressly providing boards of inquiry with authority to award costs only in s. 40(6) of the Code, the legislature has excluded jurisdiction to award costs otherwise under the Code.

If the request for "legal expenses" is costs by any other name, the request must be denied. Certainly the request for the Small Claims Court legal expenses is not compensable by the Board. Legal expenses or costs associated with defending the claim and initiating a counterclaim are properly within the purview of that court.

As for the legal expenses incurred by Mr. Ketola before the referral of his Complaint to the Board (pre-referral), the Board finds they are not compensable by it. The Board finds that they are not recoverable under either subsection 41(4) or paragraph 41(1)(b). The Board rejects the Commission's argument that pre-referral legal expenses are covered as part of a restitutive award. The process under the *Code* is *sui generis*. The whole point of having the Commission as a gatekeeper was to make the system accessible to all Ontario residents. A complainant could initiate a complaint without hiring a lawyer and free of charge. The Board does not believe that

Mr. Ketola "had" to hire his own lawyer, other than to defend and counterclaim in the Small Claims Court matter, the costs of which are properly dealt with by that Court. Indeed there are no "parties" in the litigation sense under the *Code* until stage two in the process – when the Commission refers the subject-matter of the complaint to the Board. At that point, the Commission's role changes and the complainant and the Commission become separate "parties", with the Commission having "carriage" of the matter. The Board does not believe that a complainant would have a right to recover "legal expenses" for separate representation at a hearing before the Board either: *cf. Curling*. That would amount to a dressed-up costs order or costs by any other name and would offend subsection 41(4) of the *Code*.

Complainants may choose to retain counsel, at the pre-referral and/or post-referral stages. However, the Board has no authority to award them costs or "legal expenses" as recovery. And respondents should have the expectation that they will not be faced with an order of costs at the end of the day.

PRE-JUDGMENT AND POST-JUDGMENT INTEREST

The Commission and Complainant request the Board to order both pre-judgment and post-judgment interest on all monetary amounts. "The Commission, given the respondents' behaviour and attitude throughout the human rights process, has no expectation that the respondents would willingly and quickly pay any monetary award, if paid at all." The monetary awards made by the Board are inclusive of pre-judgment interest. Post-judgment interest on the monetary awards is granted at the rate specified under the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended, to commence sixty days from the date of this Decision.

PUBLIC INTEREST REMEDIES

The Commission requests the following be part of an Order:

- posting of the Board's final decision(s) at each of Value Propane's locations in a plain and obvious place;

- requiring the personal Respondents to attend a training program facilitated by an expert on human rights issues on anti-discrimination principles and the duty to accommodate under the *Code;*

- Value Propane establish a comprehensive anti-discrimination policy and, prior to implementation of the policy, that they provide such policy to the Commission for review and comment within three months of the Board's final order;

- Value Propane post the policy at its office in a plain and obvious location accessible to all persons doing work for the corporate Respondent within one month of the Commission's completed review; and

- Value Propane post *Code* cards, to be provided by the Commission, in a plain, obvious and accessible location at its workplace.

The Board declines to order the above remedies. The Board is satisfied that the public interest is met by the monetary awards it has granted.

JOINT AND SEVERAL LIABILITY

Value Propane is a closely held corporation, own and run by the Mungall family. The Board finds that it is appropriate that its Order be as against the Respondents, jointly and severally.

ORDER

Upon finding that Value Propane Inc., Robert Mungall and Renee Mungall-Brethour violated Mr. Ketola's rights under sections 3 and 8, contrary to section 9 of the *Code*, the Board orders:

(1) the Respondents shall pay damages to the Complainant in the amount of $20,000.00 for his loss arising out of the infringement of his right to contract without discrimination because of disability, including mental anguish;

(2) the Respondents shall pay damages to the Complainant in the amount of $20,000.00 for his loss arising out of the infringement of his right to be free from reprisal, including mental anguish;

(3) the Respondents shall pay special damages to the Complainant in the amount of $12,415.00;

(4) Post-judgment interest on the monetary awards above is granted at the rate specified under the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended, to commence sixty days from the date of this Order; and

(5) the Respondents are liable, jointly and severally, for the above awards.

Dated at Toronto, this 7th day of August, 2002.

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Matthew D. Garfield
Chair